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No. 83-943

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1983

AMERICAN TRUCKING ASSOCIATIONS,
INC., ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT BRIEF OF RESPONDENTS CHARTER EXPRESS, INC., et al. IN SUPPORT OF PETITION

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QUESTION PRESENTED

Whether the national transportation policy stated in 49 U.S.C. §10101 provides the Interstate Commerce Commission an independent source of authority to improve the financial lot of non-regulated transportation entities, to the detriment of regulated carriers?

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Come now Charter Express, Inc., Hedrick Associates, Inc., North Alabama Transportation, Inc., Port Norris Express Co., Inc., and Senn Trucking Company, intervenors below and respondents herein

(hereinafter joint respondents)[1] in support of the petition of American Trucking Associations, Inc., et al., for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter, the petition). Said petition was filed on December 7, 1983.

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1. Parents, subsidiaries and affiliates of joint respondents:

   Charter Express, Inc., is affiliated with National Trucking, Inc., and Helen Reagan, d/b/a Southeast Trucking Company.

   Hedrick Associates, Inc., has no related companies.

   North Alabama Transportation, Inc., is affiliated with DeKalb Transportation, Inc., and D&E Brokers, Inc. The latter will shortly become a wholly-owned subsidiary of North Alabama Transportation, Inc.

   Port Norris Express Co., Inc., is affiliated with Garrison & Bradway, Inc.

   Senn Trucking Company has only a wholly-owned subsidiary.

OPINIONS BELOW

The opinion of the Interstate Commerce Commission, attached as Appendix A to the petition, is reported at 132 M.C.C. 756 (1982). The opinion of the United States Court of Appeals for the Eleventh Circuit, attached as Appendix B to the petition, is reported at 716 F.2d 1369 (1983). To the extent necessary, joint respondents will refer to the opinions below by citation to pages of Appendices A and B to the petition.

STATUTES

The primary statutory provision involved herein is 49 U.S.C. §10101. Relevant statutory provisions are set forth in Appendix E to the petition. References to that appendix will be made herein as necessary.

STATEMENT OF THE CASE

Joint respondents adopt the statement of the case contained in the petition.

ARGUMENT

1. Decision below will adversely impact on the soundness of the nation's regulated transportation system.

The Eleventh Circuit's decision below upholds the decision of the Interstate Commerce Commission (ICC or Commission) redrawing the boundary between regulated and non-regulated motor carriage. The change in this line of demarcation will hurt the nation's regulated motor carriers. Such a change is of major importance, and warrants this Court's consideration.

The ICC decision below did two things. First, it changed the agency's test for determining if a particular service arrangement is private carriage by doing away with certain long-standing presumptions. But also, and perhaps more importantly, the agency showed its clear intent to in the future classify as private carriage service arrangements which would previously have been held to be regulated carriage.[2] In essence, the Commission's decision opens the door to direct competition between regulated carriers and uncertificated single-source lessors in providing for-hire carriage.

The "control and responsibility" test proffered by the Commission to

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2. See generally: Lease of Equipment and Drivers to Private Carriers, 132 M.C.C. 756, 770 (1982) [page 23a of Appendix A to the petition].

replace the "control and significant assumption of the characteristic burdens of transportation" test puts no significant burden on the lessee. Merely by entering a 30-day lease for so-called exclusive use of a vehicle and driver,[3] choosing where and when its goods will be delivered, and assuring that safety inspections are performed and that liability insurance is in

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3. The Commission's decision explicitly sanctions the lessor's arrangement of coordinated leases which would allow it to serve two shippers who ship in opposite directions. Lease of Equipment and Drivers, 132 M.C.C. at 778, FN. 34, and 780 [pages 34a-35a, and 38a of Appendix E to the petition]. This leaves the lessor with the traditional "control" function of coordinating movements.

force,[4] a shipper can qualify its lease arrangement as private carriage.

In actuality, this standard leaves the lessee with little more responsibility than it would have in its ordinary non-transportation operations. In turn, this gives the lessor virtually complete responsibility for assuming the "characteristic burdens" of transportation service.

This Court has stated that a lessee must assume a significant part of the characteristic burdens of transportation to qualify its lease arrangement as pri-

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4. See generally: Lease of Equipment and Drivers, 132 M.C.C. at 778-779 [pages 34a-35a of Appendix E to petition]. The Commission's guidelines do not provide, however, that the lessee must directly bear the cost of providing insurance, but only that it assure that the operation is insured and that it bear the risk of being under insured.

vate carriage.[5] The Drum decision did not leave the Commission room to reallocate these burdens as it has attempted to do.

Under the Commission's new rules, shipper-lessees will be able to obtain from major leasing companies and approximately 125,000 owner-operators a service which is like that of a regulated motor carrier. However, these new competitors will not have to bear the burdens of regulated operation such as obtaining licenses and publishing rates. Such bur-

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5. See: United States v. Drum, 368 U.S. 370, 375 (1962) ("The Commission has correctly interpreted" the definition of private carriage to include assuming "in significant measure the characteristic burdens of the transportation business." [Emphasis added.] This language implies a fundamental attribute which is inherent in the statute, and is not within the Commission's province to change.)

dens have been affirmed by Congress as essential to a healthy transportation system.

The Commission's new definition of private carriage sets up an unequal competition between regulated carriers and unregulated leasing companies and owner-operators. By being unregulated, the new competitors will have an advantage which will allow a significant diversion of traffic from the regulated industry. This is contrary to the national transportation goal of fostering a healthy, regulated transportation system.

2. National transportation policy does not authorize the ICC to better the lot of unregulated transportation entities at the expense of the regulated industry.

The major change in the trans-

portation industry just described would hurt the nation's regulated carriers. Such a result is contrary to the national transportation policy of 49 U.S.C. §10101. Yet that section was used by the Commission and the court below to justify their decisions.

The national transportation policy states Congressional goals for improving the regulated motor carrier industry.[6] Its provisions pertain to regulating transportation by "motor carrier." Under the statute, "'motor carrier' means a motor common carrier and a motor contract carrier"; i.e., regulated

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6. See: 49 U.S.C. §10101(a)(2) [formerly §10101(a)(7); pages 98a and 99a of Appendix E to the petition].

carriers.[7]

Congress did seek in passing the Motor Carrier Act of 1980 to assist non-regulated transportation entities to some extent. However, its main tool for doing so was to specifically exempt them from Commission regulation.[8] Congress did not intend by revising the statement of the national transportation policy to give the Commission carte blanche to assist the non-regulated industry.

Nevertheless, the ICC relied on 49 U.S.C. §10101(a)(2) to broaden the

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7. 49 U.S.C. §10102(12) [formerly §10102(11); page 99a of Appendix E to the petition].

8. See: Sections 7 and 9 of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980) [pages 102a to 104a of Appendix E to the petition].

definition of private carriage in order to improve the lot of non-regulated entities such as private carriers and commercial lessors.[9] This reliance was completely wrong because the action taken hurts the regulated industry.

Also, reliance on the national transportation policy was essentially the only basis for the court's holding below. After rejecting the Commission's reliance on Sections 5, 7 and 9 of the Motor Carrier Act of 1980 to support its action, the court concluded:

> . . .that the Commission's assertion of changes in the industry, as supported by the National Transportation Policy, provides a rational basis for reconsidering and rejecting the presumptions announced in Church and Oklahoma Furni-

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9. See: Lease of Equipment and Drivers, 132 M.C.C. at 775, FN. 30 [page 30a of Appendix A to the petition].

ture.[10]

The court should not have upheld the Commission's action on the basis of the national transportation policy. That section is a guideline only. It is intended to be implemented only by the specific directives set forth elsewhere in the statute.[11]

The national transportation policy cannot serve as the sole authority for a

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10. Ryder Truck Lines, Inc. v. United States of America and Interstate Commerce Commission, 716 F.2d 1369, 1386 (11th Cir. 1983) [page 90a of Appendix B to the petition].

11. See: 49 U.S.C. §10101(b) [page 99a of Appendix E of the petition]; Cf: 49 U.S.C. §10922(b)(2) ("In making a finding under [the common carrier licensing standards] the Commission shall consider, and to the extent applicable, make findings on at least the following: (A) the transportation policy of section 10101(a) of this title; . . .) [page 101a of Appendix E to the petition].

Commission action.[12] In upholding the Commission's action on that basis, the court below erred.

CONCLUSION

The issue determined below is of exceptional importance to the existence and health of a regulated national transportation system. As such, that issue requires this Court's attention.

The court below relied on the national transportation policy as authority for the action taken by the Commission. That reliance abuses the intent of the national transportation policy by turning it against the regulated industry and by treating it as conferring on the Commission independent authority to act.

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12. See: Central Forwarding, Inc. v. Interstate Commerce Commission, 698 F.2d 1266 (5th Cir. 1983).

This misuse of the national transportation policy requires correction by this Court, particularly in light of the conflict between the decision below and Central Forwarding v. Interstate Commerce Commission, supra.

WHEREFORE, joint respondents pray that this Court grant petitioners' request for issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on its decision below.

Respectfully submitted,

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